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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/647,071	08/22/2003	Philip A. Swain	11662-003-999	9609

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EXAMINER	
STEELE, AMBER D	
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1639	
MAIL DATE	DELIVERY MODE
11/17/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Continued

The amendment filed November 4, 2009 under 37 CFR 1.116 in reply to the final rejection has been considered but is not deemed to place the application in condition for allowance and will not be entered because of the following:

a. The proposed amendment requires further consideration and/or search (e.g. proposed new claims 161-168).

b. The proposed amendment may necessitate the modification of outstanding rejection(s) to address the new limitation.

c. The proposed amendment may necessitate the raising of new prior art rejections.

d. The proposed amendment may necessitate the raising of new 112 issues.

e. There is no convincing evidence under 37 CFR 1.116(b) why the proposed amendment was not earlier presented.

f. Applicants arguments of the prior art of record are moot since the arguments are based on the proposed amendments that have not been entered.

g. Regarding the traversal of the ODP rejection, applicants contend that only claims may be utilized to support an ODP rejection, that Green may not be utilized because Green teaches utilizing pseudomonas exotoxin as a carrier for an antigen (i.e. not a hapten), and that the claimed compounds have unexpected results (i.e. reference utilized is for a competitor's, i.e. Nabi Biopharmaceuticals, vaccine formulation currently in clinical trials).

This is not found persuasive because of the following:

(a) This does not mean that one is precluded from all use of the patent disclosure. The specification can be used as a dictionary to learn the meaning of a term in the patent claim. *Toro Co. v. White Consol. Indus., Inc.*, 199 F.3d 1295, 1299, 53 USPQ2d 1065, 1067 (Fed. Cir. 1999)("[W]ords in patent claims are given their ordinary meaning in the usage of the field of the invention, unless the text of the patent makes clear that a word was used with a special meaning."); *Renishaw PLC v. Marposs Societa* ' per *Azioni*, 158 F.3d 1243, 1250, 48 USPQ2d 1117, 1122 (Fed. Cir. 1998) ("Where there are several common meanings for a claim term, the patent disclosure serves to point away from the improper meanings and toward the proper meanings."). See also MPEP § 2111.01. Further, those portions of the specification which provide support for the patent claims may also be examined and considered when addressing the issue of whether a claim in the application defines an obvious variation of an invention claimed in the patent. *In re Vogel*, 422 F.2d 438, 441-42, 164 USPQ 619, 622 (CCPA 1970). The court in Vogel recognized "that it is most difficult, if not meaningless, to try to say what is or is not an obvious variation of a claim," but that one can judge whether or not the invention claimed in an application is an obvious variation of an embodiment disclosed in the patent which provides support for the patent claim. According to the court, one must first "determine how much of the patent disclosure pertains to the invention claimed in the patent" because only "[t]his portion of the specification supports the patent claims and may be considered." The court pointed out that "this use of the disclosure is not in contravention of the cases forbidding its use as prior art, nor is it applying the patent as a reference under 35 U.S.C. 103, since only the disclosure of the invention claimed in the patent may be examined.",

(b) the use of a carrier with an antigen (i.e. Green) to boost the antibody response shows that even with an antigen which would produce an antibody response a carrier/adjuvant can be utilized to further enhance the immune response, therefore, one of skill in the art would recognize that the use of a carrier/adjuvant would be even more important when utilizing a hapten (please also refer to previous Office actions wherein similar arguments were traversed), and

(c) the claims are not commensurate in scope with the Nabi Biopharmaceutical (i.e. competitor's) vaccine.

h. For all the reasons above, the amendment does not place the application in better condition for allowance and/or appeal.

Future Communications

Any inquiry concerning this communication or earlier communications from the examiner should be directed to AMBER D. STEELE whose telephone number is (571)272-5538. The examiner can normally be reached on Monday through Friday 9:00AM-5:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christopher Low can be reached on 571-272-0951. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Amber D. Steele/
Primary Examiner, Art Unit 1639